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Sens Sen.

OLC 75-0929
27 May 1975

MEMORANDUM

SUBJECT: Electronic Surveillance Legislation

1. Over a dozen bills have been introduced in Congress to date aimed at restricting electronic surveillance conducted on national security grounds. Although impelled by concern for the Fourth Amendment rights of American citizens, the major bills in this area (S. 743, H.R. 141, H.R. 214) are characterized by a heavy-handed approach which poses a serious threat to the exploitation of foreign SIGINT sources, both within the United States and overseas. (Signals intelligence subsumes communications intelligence and electronic intelligence.)

2. The 1968 Omnibus Crime Control and Safe Streets Act (18 U.S.C. 2510, et seq.) established certain procedures which require the Government to obtain a court order issued on probable cause prior to conducting wire or oral communication interception in the investigation of certain offenses. In section 2511(3) of that Act, Congress specifically disavows any limitation on the constitutional powers of the President in national security matters and recognizes that the President has inherent constitutional authority to engage in certain foreign intelligence activities:

> (n)othing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President ... to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. (emphasis added)

The emphasized language implicitly recognizes that foreign intelligence surveillances may be distinguished from national security surveillances aimed at the discovery and prosecution of criminal conspiracies and activity.

3. In reliance on these Presidential powers and congressional recognition thereof, foreign intelligence signal and communication interceptions may be conducted within the United States without judicial warrant.

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4. Sentiment that the provisions of 18 U.S.C. 2511(3) (quoted above) are incompatible with Fourth Amendment rights has spawned a Senate bill and over a dozen House bills (some of these identical) aimed at closing what the sponsors view as "the national security loophole" in current surveillance laws. A distinctive approach to national security surveillance is taking shape which would prohibit the use of warrantless surveillance for any reason whatsoever, treating national security surveillance under a single rubric, without distinguishing between gathering foreign intelligence on the one hand, and national security surveillances aimed at the discovery and prosecution of criminality, on the other.

(a) S. 743 by Senators Nelson and Kennedy would amend 18 U.S.C. 2510, et seq., as follows: First, repeal 18 U.S.C. 2511(3) thereby withdrawing whatever congressional recognition that section gave the foreign intelligence surveillance powers of the President. Second, prohibit intercepting the communications of an American citizen or alien admitted for permanent residence until a prior judicial warrant is obtained issued on probable cause that a specific crime, e.g., espionage, has been or is about to be committed. Third, prohibit intercepting the communication of a foreign power or its agent until a prior judicial warrant is obtained by establishing probable cause (a) that such interception is necessary to protect the national defense (note narrower standard than national security); (b) that the interception will be consistent with the international obligations of the United States; and (c) that the target is a foreign power or foreign agent. (A foreign agent is defined as any person, not an American citizen or alien lawfully admitted for permanent residence, whose activities are intended to serve the interests of a foreign power and to undermine the national defense. Each application for such an interception would be made to the D. C. Federal District Court on personal and written authorization of the President and would provide detailed information on the target, the purposes and justification of the interception.) Upon court approval, only the FBI would be authorized to intercept the communication. Fourth, require that every American citizen targetted be informed of the specifics of the surveillance within a month of the last authorized interception. (This disclosure could be postponed if the Government satisfies the court that the target is engaged in a continuing criminal enterprise or that disclosure would endanger national security interests. A foreign power or its agent need not be informed of interceptions.) Fifth, require the Attorney General to report to the Congress, at least quarterly, the details of each interception undertaken on national security grounds, to be filed with the Senate Foreign Relations and Judiciary Committees and the House International Relations and Judiciary Committees.

(b) H. R. 141 by Representative Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which has legislative jurisdiction for surveillance, is similar to the above bill. It would repeal 18 U.S.C. 2511(3) and amend Title 18 to permit communications interception in national security cases only under court order issued on probable cause that an individual has committed one of several enumerated offenses or is engaged in activities intended to serve the interests of a foreign principal and to undermine the national security. (From the language of the bill, it could be argued that the foreign agent's activities would have to constitute a criminal offense before a warrant could be issued.) The bill does not mention the communications of a foreign power. Each application for an interception would have to be authorized by the Attorney General and made to a Federal judge of competent jurisdiction. The targetted individual would be informed of the surveillance within ninety days. The President, Attorney General, and all Government agencies would be required to supply Congress, through the Senate Judiciary and Foreign Relations Committees and the House Judiciary and International Relations Committees, any information regarding any interception applied for.

(c) H. R. 214 by Mr. Mosher and seven identical bills co-sponsored by over 70 Congressmen from both parties, would prohibit any interception of communications, surreptitious entry, mail-opening, or the procuring and inspection of records of telephone, bank, credit, medical, or other business or private transactions of any individual without court order issued on probable cause that a crime has been committed. Like S. 743 and H. R. 141, reviewed above, H.R. 214 would repeal 18 U.S.C. 2511(3). Unlike the above bills, H.R. 214 does not provide for non-law enforcement surveillance. It would also strike out provisions for summary procedures for intercepting communications during emergencies and would require that detailed information on each application for a communication interception be reported to the House and Senate Judiciary Committees.

5. Intelligence Community Interests: These bills, through imposing judiciary administration over all surveillance, would impair existing responsibility to conduct electronic surveillance in gathering foreign positive intelligence, which now reaches wholly domestic communications, those both transmitted and received within the United States; wholly foreign communications, those both transmitted and received abroad; and transnational communications, international communications received in or transmitted from the United States.

SIGINT provides a broad range of foreign intelligence ranging from early warning indicators to the most mundane information. The importance of any single intercept or series of interceptions cannot be anticipated in advance; therefore, the probable cause standard and the proposed requirements of "particularity" are inappropriate in connection with this method of foreign intelligence collection. (Furthermore, the House bills would impair existing responsibility for using other intelligence gathering techniques against foreign subjects within the United States, e.g., medicepts, photo surveillance, etc.)

6. Effect on Intelligence Community Interests: The bills reviewed above would severely restrict domestic communications interception for foreign intelligence gathering purposes; raise serious questions respecting authority to intercept transnational communications; and would even raise questions concerning the foreign intelligence community's authority to conduct electronic surveillance abroad free from judicial intrusion or other conditions. (Moreover, the House bills would restrict the use of other intelligence gathering techniques against foreign targets within the United States.)

(a) Domestic Electronic Surveillance: An operation mounted against a foreign target within the United States to gather foreign positive intelligence would apparently not meet the court test unless the specific message targetted involved an anticipated, demonstrable and direct threat to the national defense. S. 743 explicitly confers interception authority to the FBI alone. It also explicitly raises the issue of the consistency of surveillance with international obligations, e.g., the Vienna Convention, and thus challenges the position taken by the State Department that no current international obligation precludes targetting foreign facilities within the United States.

(b) Transnational Electronic Surveillance: Proposed legislation would apparently subject the interception of transnational communications from a situs within the United States to the probable cause standard. It could also provide grounds for arguing that interceptions of transnational communications from facilities outside the United States would be subject to the same standard.

(c) Foreign Electronic Surveillance: The bills reviewed above are broadly written and the prohibitions are not expressly limited to the territory of the United States. While the reach of this legislation should be subject to the built-in limitation that the authority of a federal court to issue warrants is confined to its territorial limits, repeal of 18 U.S.C. 2511(3) and the articulation of probable cause standards for foreign intelligence gathering activities could have a grave impact on overseas intelligence collection by bringing into play a body of exclusionary rule case law (developed in ruling on the admissability in a Federal criminal trial of evidence obtained overseas by electronic surveillance). Suffice it, here, to say that this could result in

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subjecting overseas foreign intelligence surveillance to the proposed probable cause standards as a test of the "reasonableness" required by Fourth Amendment protections. Moreover, this legislation could raise complex questions in situations where an element of the interception process falls within the jurisdiction of the federal court, e.g., the physical presence of the surveillance device. Even if these bills would not directly affect authority to conduct foreign electronic surveillance, they could ultimately weaken it by raising the opportunity to argue that this authority rests only on three bases--assertion of inherent Presidential intelligence-gathering powers, congressional recognition and judicial acceptance. Repeal of 18 U.S.C. 2511(3) may be viewed as weakening the argument that Congress has recognized foreign intelligence gathering authority inherent in the President and delegated to his Executive branch agents.

7. Summary:

--Proposed legislation would repeal 18 U.S.C. 2511(3) and would impose judicial administration of a "probable cause" standard over foreign intelligence electronic surveillance. At the very least, this would restrict communications interceptions against foreign targets within the United States to situations involving an anticipated, demonstrable and direct threat to the national defense. Also, this would probably subject the interception of transnational communications, from either an overseas or domestic situs, to the same judicial standards. Finally, this would raise difficult questions concerning the ability of CIA, NSA, and the service cryptologic agencies to conduct electronic surveillance overseas against foreign targets without conforming to the standards of Fourth Amendment "reasonableness" articulated in this legislation. In sum, enactment of proposed legislation would severely restrict the collection and processing of foreign SIGINT and would seriously impair the production of all-source intelligence.

--By repealing 18 U.S.C. 2511(3) and by introjecting the judiciary into the field of foreign intelligence gathering, proposed legislation raises a constitutional challenge insofar as it purports to withdraw sanction of and place limitations on the President's inherent power to conduct foreign surveillance. This infringement could undermine the Executive sources of authority upon which the intelligence community depends. To be sure, the proposed requirement of prior judicial authorization of foreign intelligence surveillances is altogether impractical. But the fundamental constitutional objection is that it purports to share Executive authority with judicial officers having no expertise in or responsibility for national security or foreign affairs. The necessity of a foreign intelligence surveillance is simply inappropriate for judicial resolution. It is a matter committed to the Executive branch by the Constitution and an area for which there are no judicially manageable standards. An arrangement by which federal judges decide what foreign intelligence the President may have in his conduct of foreign

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relations is incompatible with the Chief Executive's inherent foreign intelligence gathering powers. Since this Presidential authority is constitutional in nature and stems from a fundamental separation of governmental powers, a Congressional attempt to require its sharing with the judiciary would certainly lead to protracted constitutional litigation. Moreover, Congress implicitly authorized the use of electronic surveillance in foreign intelligence activities and this legislation would circumscribe the very functions which Congress intended the Agency to perform.